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No. 96-1279

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

GEORGE G. ROGERS, PETITIONER,

v.

UNITED STATES, RESPONDENT.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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MOTION OF PETITIONER FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Petitioner George G. Rogers hereby respectfully moves this Honorable Court, pursuant to Supreme Court Rule 25.6, for leave to file the attached 3-page Supplemental Brief. In support of his Motion, Petitioner states as follows:

1. At oral argument, various Justices inquired as to whether the question presented is properly before the Court in this case. In particular, Justices questioned whether the *mens rea* element required by *Staples* v. *United States*, 511 U.S. 600 (1994) was, as presumed by the question presented, omitted by the trial court from the jury's instructions.

2. In order to address these concerns, and because this issue was not specifically addressed by the parties in their briefs, petitioner respectfully asks that he be granted leave to file a short 3-page Supplemental Brief which articulates the

various reasons why the question presented is indeed properly subject to the Court's review in this case.

WHEREFORE, for the reasons set forth above, petitioner George G. Rogers respectfully requests that this Court grant him leave to file the attached 3-page Supplemental Brief.

Respectfully submitted.

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SUPPLEMENTAL BRIEF FOR PETITIONER

At oral argument, various Justices inquired as to whether the question presented is properly before the Court in this case. In particular, Justices questioned whether the *mens rea* element required by *Staples* v. *United States*, 511 U.S. 600 (1994) was, as presumed by the question presented, omitted by the trial court from the jury's instructions. As we briefly explain below, the question presented is indeed properly the subject of this Court's review in this case.

First and foremost, the question presented *precisely* tracks the decision of the court of appeals: the Eleventh Circuit held that "[w]ith the benefit of the Supreme Court's opinion in *Staples*, we can now indubitably state that the district court's action effectively omitted from the instructions an essential element of the crime charged under § 5861(d)," and that the error nevertheless was subject to harmless-error review because "the instructional omission related to an element of the crime that defendant in any case admitted." Pet. App. 8a, 16a. This alone confirms that the question presented is squarely presented for the Court's review, since it is the central question that was "passed upon" by the court of appeals. *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Accord *United States* v. *Williams*, 504 U.S. 36, 41-42 & n.2 (1992); *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

Second, the premise of the question presented — *i.e.*, that the *Staples* element was omitted from the jury's instructions — is also supported by the government's repeated concessions both in the court of appeals and in this Court, that the *Staples* element was "explicitly withdrawn" from the jury's consideration. In fact, the question presented actually was *framed* by the government in its opposition to certiorari. In the court of appeals, the government also conceded that the *Staples* element was withdrawn and that the trial court's charge did "not pass post-*Staples* muster insofar as it explicitly withdrew from the jury's consideration the issue of appellant's knowledge

that the 'firearm' he possessed fell within the statutory definition." U.S. C.A. Br. 10. In this Court, the government likewise has conceded (both in opposition to certiorari, in its merits brief, and again at oral argument) that "[t]he court did not clearly instruct the jury that, to convict, it had to find that petitioner specifically knew that the item in his possession was a silencer or that it had characteristics that subject it to regulation under Section 5845." U.S. Br. in Opp. 2-3. See also U.S. Br. 7-8, 12-13. These candid concessions not only confirm that the jury reasonably could have understood the trial court's instructions as removing the *Staples* element from its consideration, but that this issue need not even be considered by this Court since the government has explicitly waived any argument that the element was not omitted by the trial court. See, *e.g.*, Sup. Ct. R. 15.2.

Third, a careful review of the jury instructions themselves reveals that the trial court *did*, as the court of appeals held, omit the *Staples* element from the jury's consideration. In *Staples*, this Court held that to convict a defendant of possession of unregistered "firearms" the government must prove that the defendant knew "the particular characteristics that make his weapon a statutory firearm." 511 U.S. at 609. The trial court removed that element from the jury's consideration by charging that "[i]t is not necessary for the Government to prove that Defendant knew that the item described in the indictment was a 'firearm' which the law requires to be registered." J.A. 104. The trial court reiterated its removal of this element in its summary of the government's burden of proof, which makes no reference at all to the *Staples* element: "What must be proved beyond a reasonable doubt is that the Defendant knowingly possessed the item as charged, that such item was a 'firearm' as defined above, and that i[t] was not then registered to the Defendant in the National Firearms Registration and Transfer Record." *Ibid.*

Finally, even if the court's instructions are viewed as ambiguous, the instructional error nonetheless would remain because, as the court of appeals' decision and the government's concessions confirm, there is certainly a "reasonable likelihood" that the jury below interpreted the instructions as removing the *Staples* element — which is all that is required by this Court's holding in *Boyde* v. *California*, 494 U.S. 370, 380 (1990).

In sum, the question presented in this case is properly presented for the Court's review, both because it precisely tracks the holding of the court of appeals, because it is amply supported by the record below, and because the government has waived any contention that the *Staples* element was not omitted by the trial court. Thus, as explained in the Petition, this case provides an ideal vehicle to resolve the pervasive confusion that exists at the state and federal levels over the question of whether and to what extent the omission of an element is subject to harmless-error scrutiny. See Pet. 11-17.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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